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91-2019

No. 92-____

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat down, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

IN THE
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No.____

STATE OF MINNESOTA,
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TIMOTHY DICKERSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on March 20, 1992.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached to this Petition as Appendix A, is reported at 481 N.W.2d 840 (Minn. 1992). The opinion of the Minnesota Court of Appeals, reproduced and attached to this Petition as Appendix B, is reported at 469 N.W.2d 462 (Minn. Ct. App. 1992). The order of the Fourth Judicial District Court (trial court), reproduced and attached to this Petition as Appendix C, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on March 20, 1992. This petition for a writ of certiorari was filed within ninety days of the Minnesota Supreme Court's decision.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1992).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The charged offense in this case concerned the illegal possession of cocaine. The cocaine was discovered as the result of an investigative stop and a protective pat down search of Respondent Timothy E. Dickerson. The facts concerning the stop and search are set forth in the trial court's findings of fact which read as follows:

> 1. At approximately 8:15 p.m., on November 9, 1989, Officer Rose of the Minneapolis Police Department was on routine patrol in his squad in the area of 10th and Morgan Avenue North in the City of Minneapolis, Hennepin County.
> 2. Rose is a 14-year veteran of the Department, having served 11 1/2 years in North Minneapolis. Over the past two years, he has participated in approximately 75 drug search warrant executions and made between 50 and 75 drug arrests.
> 3. Officer Rose had personally participated in search warrants at the address at 1030 Morgan Avenue North resulting in drug seizures as well as seizures of guns and knives.
> 4. Officer Rose had personally responded to complaints at this address of drugs being sold in the hallways.
> 5. On the evening in question, Officer Rose observed the [Respondent], a man unknown to him, come out of the front door of the address at 1030 Morgan Avenue North and walk towards the street. Officer Rose observed that when the

man saw the squad car, he made an abrupt turn and walked towards the alley.

6. Rose and his partner drove into the alley where they stopped [Respondent].

7. Officer Rose conducted a pat search of the [Respondent] for weapons. Officer Rose felt a small, hard object wrapped in plastic in [Respondent's] pocket.

8. Based upon his training and experience, Officer Rose formed the opinion that the object in [Respondent's] pocket was crack/cocaine and removed it. Subsequent testing revealed this to be .20 grams of crack/cocaine.

(Appendix C-1-2).

On December 19, 1989, Respondent was charged with the offense of controlled substance crime in the fifth degree.[1] At a pretrial hearing, Respondent moved to suppress the crack cocaine on the ground that the stop and pat down search violated the Fourth and Fourteenth Amendments of the United States Constitution. Both Officer Rose and Respondent testified at this hearing concerning the events leading up to the seizure of the cocaine.

Officer Rose testified that when he conducted a pat down of Respondent's "very fine nylon" jacket, he "felt a lump, a small lump, in the front pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane" (T.9).[2] Officer Rose also testified

1. Minn. Stat. § 152.025, subd. 2(1), subd. 3(a) (1989) (Appendix D-1).

2. "T" refers to the transcript of the pretrial, trial and sentencing proceedings in this case.

that he had "felt [crack cocaine] in clothing" approximately 50 to 75 times on prior occasions and "was absolutely sure that's what [was in Respondent's pocket], or [he] would have left it there." (T.5-6, 9-10). Respondent testified concerning the events leading up to the stop, but did not dispute Officer Rose's testimony concerning the feeling and seizing of the crack cocaine (T.28-33).

On March 6, 1992, the trial court made findings of fact and ruled that the investigative stop and search was proper. In its order denying the suppression motion, the trial court made the following conclusions of law:

1. Officer Rose had a reasonable suspicion based upon objective facts that [Respondent] was involved in criminal activity.

2. Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley.

3. Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in [Respondent's] pocket and this seizure was reasonable.

(Appendix C-3). In its accompanying memorandum, the trial court noted that the seizure of the cocaine was justified under the "plain feel" exception which was "no different than plain view." (Appendix C-5).

Respondent requested that the case be submitted to the trial court on the basis of the testimony presented at the pretrial hearing and on certain stipulated facts. On May 9,

1990, the trial court deferred a finding of guilt[3] and placed Respondent on probation for two years.[4]

Respondent appealed his deferral of guilt to the Minnesota Court of Appeals. The court of appeals affirmed the stop and pat down search, but held that the seizure of the cocaine exceeded the constitutional parameters of *Terry v. Ohio*, 392 U.S. 1 (1968), and reversed the trial court's deferral of guilt. *See State v. Dickerson*, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (Appendix B). The court of appeals held that "the scope of a pat search must be strictly limited to a search for weapons" and declined "to adopt the plain feel exception in Minnesota." *Dickerson*, 469 N.W.2d at 466 (Appendix B-9-10).

The Minnesota Supreme Court granted further review in this case.[5] On March 20, 1992, a unanimous supreme court held that the stop and pat down search was proper. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (Appendix A-4-5). But, in a four-to-three decision, the

3. Under Minn. Stat. § 152.18, subd.1 (1989) a trial court may, without entering a judgment of guilty, place a person charged under the controlled substance laws on probation for a period of time. If the person successfully completes probation, the proceedings against the person are dismissed. A non-public record of the proceedings is maintained, however, so that courts may consider this record in future proceedings against the person (Appendix D-2-3).

4. On April 28, 1992, Respondent successfully completed probation and these proceedings were dismissed pursuant to Minn. Stat. § 152.18 (1989).

5. The State of Minnesota petitioned for further review. Contrary to what the Minnesota Supreme Court stated in its decision, *State v. Dickerson*, 481 N.W.2d 840, 842 (Minn. 1992) (Appendix A-2), Respondent did not file a cross appeal with the supreme court.

supreme court affirmed the court of appeals' ruling that the seizure of the crack cocaine violated the Fourth Amendment to the United States Constitution.[6] The majority opinion held that the seizure of the crack cocaine "in this case required a warrant, which police did not have." *Id.* (Appendix A-5). In so holding, the majority opinion stated the following:

> Because we do not believe the senses of sight and touch are equivalent, *we decline to extend the plain view doctrine to the sense of touch.* We reach this conclusion for two primary reasons. First, the sense of touch is inherently less immediate and less reliable than the sense of sight . . . . But even more important, the sense of touch is far more intrusive into the personal privacy that is at the core of the fourth amendment. It is one thing to see a bag of marijuana in a suspect's pocket . . . . It is quite something else to pinch, squeeze and rub the

6. The Minnesota Supreme Court's decision repeatedly refers to the Fourth Amendment as the basis of its decision. Since the search and seizure provision of the Minnesota Constitution is contained in Article I, § 10, it is clear that the supreme court based its decision in this case on the Fourth Amendment to the United States Constitution. The fact that the supreme court did not state or imply that its holding was based upon state constitutional provisions further supports the conclusion that this holding is based solely upon federal constitutional grounds. In *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991), in contrast, when the Minnesota Supreme Court relied upon the Minnesota Constitution to invalidate statutory distinctions between crack cocaine and powder cocaine on the ground that it was racially discriminatory, it clearly enunciated that it was basing its decision on the state constitution rather than the federal constitution's Equal Protection Clause.

> suspect's pocket to see what might be inside. Observing something that is held out to plain view is not a search at all . . . . Physically touching a person cannot be considered anything but a search.
>
> * * *
>
> "[P]lain feel" is not a well-delineated exception to the fourth amendment. The Supreme Court never has recognized it and neither have we.

Id. at 845-46 (emphasis added) (Appendix A-8-9, A-11).[7]

The three-member dissent, written by Justice Coyne, stated that the majority's conclusion "that the 'crack' cocaine discovered in the pocket of the defendant's jacket is the inadmissible product of an unreasonable search and seizure represents a departure from common sense and common experience." *Id.* at 846 (Coyne, J., dissenting) (Appendix A-13). In response to the majority's rejection of the "plain feel" exception to the Fourth Amendment, the dissent stated:

> This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was "absolutely sure" that the substance was

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7. The majority opinion also rejected Officer Rose's testimony that he immediately knew that the object was crack cocaine, despite the fact that the trial court found this testimony to be credible and Respondent did not dispute this testimony. *See State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1991) (Appendix A-6).

> crack cocaine "before" he reached into the pocket and removed it.
>
> * * *
>
> [T]he officer did not violate [Respondent's] fourth amendment rights in discovering and seizing the crack cocaine . . . . *[A] policeman should not be compelled to ignore what his senses--whether sight, sound, smell, taste, or touch--tell him in clear and unmistakable language.*

Id. at 849, 851 (Coyne, J., dissenting) (emphasis added) (Appendix A-18-19, A-23-24).

REASONS FOR GRANTING THE WRIT

I. THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WHICH REQUIRES A POLICE OFFICER TO DISREGARD CONTRABAND WHICH HE LEGITIMATELY DISCOVERS THROUGH HIS SENSES DURING A VALID *TERRY* SEARCH.

The question presented herein is whether the Fourth Amendment to the United States Constitution requires a police officer to ignore contraband discovered during the course of a legitimate *Terry* frisk simply because the officer learned of the contraband through the sense of touch rather than the sense of sight. In a four-to-three decision, the Minnesota Supreme Court held that it does and that any evidence obtained as a result of a warrantless seizure, where probable cause was obtained through the sense of touch, must be suppressed. The majority also held that, under these circumstances, the police were required to obtain a warrant before they could seize the crack cocaine. The logical corollary to the supreme court's majority holding is that during a *Terry* frisk, police may not seize an object even when they have probable cause to believe that the object is contraband or other evidence of a crime if probable cause is based upon any sense other than sight.

The holding by the majority of the Minnesota Supreme Court is an unduly rigid application of *Terry v. Ohio*, 392 U.S. 1 (1968), and conflicts directly with this Court's prior decisions. In rejecting a similar claim that

seizures during a *Terry* search should be limited to weapons, this Court stated the following:

> If, while conducting a legitimate *Terry* search . . . the officer should, as here, discover contraband other than weapons, *he clearly cannot be required to ignore the contraband*, and the Fourth Amendment does not require its suppression in such circumstances . . . .

Michigan v. Long, 463 U.S. 1032, 1050 (1983) (citations omitted; emphasis added).

The majority's holding in *Dickerson* that other senses are less reliable than sight and cannot constitute the basis for a warrantless probable cause seizure is in direct conflict with a long line of cases by this Court. *See* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dickinson L. Rev. 521, 533-37 (1991) [hereinafter Holtz, *"Plain Touch" Corollary*].

That probable cause can be based upon senses other than sight is evident from this Court's decision in *Texas v. Brown*, 460 U.S. 730 (1983). In *Brown*, a plurality of this Court affirmed the seizure of a balloon container observed by a police officer after he stopped the defendant at a routine driver's license checkpoint. The balloon contained controlled substances. In affirming the seizure, this Court stated that the plain view seizure doctrine "reflects the fact that requiring police to obtain a warrant once they have obtained a *first-hand perception* of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience' . . . that might involve danger to the police and public." *Id.* at 739 (emphasis added). This Court's use of "perception" rather than "viewing" or

"seeing" strongly indicated that this Court was not limiting plain view merely to those items that can be seen. *See* Holtz, *"Plain Touch" Corollary*, at 532-33.

In several cases, this Court has recognized that probable cause can be determined through senses other than sight. In *Johnson v. United States*, 333 U.S. 10 (1948), this Court effectively recognized a "plain smell" corollary to the "plain view" doctrine. The defendant in *Johnson* had contended that that a narcotics officer's detection of the odor of burning opium from an adjacent room was an insufficient basis to justify the issuance of a search warrant. In rejecting this contention, this Court stated that detection of the presence of distinctive odors by one "qualified to know the odor" was a sufficient basis for a search warrant. *Id.* at 13; *see also United States v. Johns*, 469 U.S. 478, 482 (1985) (scent of marijuana from trucks provided officers with sufficient probable cause to believe trucks contained contraband).

This Court's decision in *Terry* "is perhaps the most logical forerunner of the plain touch corollary." Holtz, *"Plain Touch" Corollary*, at 534. In *Terry*, while conducting a protective pat down search, Officer McFadden did not place his hands in Terry's pockets until "he had felt" a weapon. *Terry*, 392 U.S. at 29-30. His determination that what he felt was a weapon was based upon his training and experience as a police officer. *See id.* at 5. Consequently, Officer McFadden's "feel" or touching of the item, coupled with his years of experience as a police officer, provided him with sufficient probable cause to believe it was a weapon and he was justified in seizing it without a warrant. *See id.* at 29-31.

The logical corollary to *Terry* is present in this case. Like Officer McFadden in *Terry*, Officer Rose was conducting a lawful pat down search when he felt the crack

cocaine. Also like Officer McFadden, Officer Rose testified that he was able to identify the seized object based upon his extensive experience as a police officer. The only difference between this case and *Terry* is that the item seized in this case was a controlled substance rather than a weapon. This difference, however, has no constitutional significance since this Court has previously ruled that the Fourth Amendment does not require police to ignore contraband when it is discovered during a legitimate *Terry* search. *Long*, 463 U.S. at 1050.

That seizure of a non-weapon should be permissible during a Terry search is supported by the following statement by Professor LaFave:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.*

Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987) (emphasis added).

Finally, this Court's decision in *Arkansas v. Sanders*, 442 U.S. 753 (1979), *modified on other grounds by United States v. Ross*, 456 U.S. 798 (1982), supports the position that certain objects, despite the fact that they cannot be seen, are open to "plain view . . . because their contents can be inferred from their outward appearance." *Id.* at 764-

65 n.13. Here, the shape of the crack cocaine became known to Officer Rose through his legitimate touching of Respondent's pocket during a pat down search. The shape of the crack cocaine made its contents known to the officer and was, therefore, properly subject to seizure.

Officer Rose's act of feeling the outline and shape of the lump, and his decision to seize the item once he realized it was crack cocaine was permissible under this Court's prior decisions. His probable cause to believe that this item was crack cocaine was bolstered by the fact that Respondent had just exited a notorious crack house and had taken evasive action when he saw the police. The Minnesota Supreme Court's holding has resulted in the untenable position that, following a valid *Terry* search, a person who police have probable cause to believe possesses crack cocaine *is free to walk away with the crack cocaine if the probable cause is based upon the officer's sense of touch.* Such a broad view of the scope of the Fourth Amendment "represents a departure from common sense and common experience." *Dickerson,* 481 N.W.2d at 846 (Coyne, J., dissenting) (Appendix A-13). Review by this Court is necessary to correct the *Dickerson* majority's misinterpretation of the Fourth Amendment on this important federal question.

II. THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

Numerous federal and state courts have addressed the issue of "plain feel" seizures arising out of investigative or other legitimate stops by police officers. All of the federal courts and a majority of the state courts ruling on this issue have held that probable cause for a seizure of an object may be based upon an officer's sense of touch. The Minnesota Supreme Court and several other state courts have adopted the opposite position. Review by this Court is necessary to resolve this conflict and to ensure that the Fourth Amendment is applied uniformly across the country.

Federal and State Courts that have Approved "Plain Feel" Seizures

Whether probable cause can be based upon the "feel" of an object has been directly addressed by the Second, Fourth, Eighth, Ninth, and District of Columbia Courts of Appeals. These federal circuit courts have unanimously held that a police officer may seize an object when the officer touches an item and, as a result of that touch, develops sufficient probable cause to believe that the object

is contraband or other evidence of a crime.[8] *See United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), *cert. denied*, No. 91-7752, 1992 WL 68687 (U.S. May 18, 1992) (although the plain feel doctrine was not explicitly mentioned,[9] the court held that the feel of an item in a weapons pat down can provide probable cause to justify a warrantless search for narcotics on a suspect); *United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989) (seizure of two plastic baggies of cocaine from defendant's pocket during pat down search for weapons; if not proper as a "plain view" case was proper as a "plain feel" case); *United States v. Williams*, 822 F.2d 1174, 1181-85 (D.C. Cir. 1987) (seizure of bag was justified under the plain touch doctrine when officer, who properly picked up bag, knew immediately from touching it that it contained baggies of heroin); *United States v. Norman*, 701 F.2d 295, 297-98 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983) (coast guard officer's "opportunity to see, smell and even feel the bales" of marijuana was sufficient for the marijuana to be in "plain view"); *United States v. Portillo*, 633 F.2d 1313, 1316, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981) (police seizure of gun and other evidence in bag was proper

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8. The Fifth Federal Circuit Court of Appeals has not directly ruled upon the "plain feel" doctrine, but its ruling in one case is consistent with this doctrine. In *United States v. Smith*, 649 F.2d 305, 309 (5th Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983), the Fifth Circuit affirmed the seizure of cocaine when, during a consensual narcotics pat down search, the officer felt what appeared to be cocaine in a suspect's pocket, reached inside the pocket and removed the cocaine.

9. In an earlier decision, the Second Circuit Court of Appeals explicitly adopted the "'plain feel' version of the 'plain view' doctrine." *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981).

since "the contents of the paper bag were apparent from the outward feel of the container").

Two federal district courts have determined that probable cause for a warrantless seizure can be based upon the officer's feel of the object. *See United States v. Ceballos*, 719 F. Supp. 119, 122, 128 (E.D.N.Y. 1989) (seizure of narcotics proper as incident to arrest where officer developed probable cause to believe defendant possessed narcotics from touching bulge on defendant during a protective pat down search); *United States v. Pace*, 709 F. Supp. 948, 954-55 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990) ("plain touch" exception justified seizure of cocaine bricks when officer immediately identified these objects as cocaine when he felt them during a consensual pat down search).[10]

Appellate courts in nine states have also held that an object is subject to seizure if, as a result of a lawful touching, an officer develops probable cause to determine that the object is contraband.[11] *See Jackson v. State*, 804

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10. Research has disclosed one case in which a federal district court has ruled that police are not allowed to seize an item from a suspect's pocket even though the officer believed that the lump in the pocket contained cocaine. *See United States v. Rodriquez*, 750 F. Supp. 1272 (W.D.N.C. 1990). This case, however, is distinguishable from the "plain feel" cases because the officer "saw" the lump in the suspect's pocket and did not "feel" it during a pat down search. The court apparently concluded that observation of "a small, inconspicuous bulge" was not a sufficient basis to believe that the lump was cocaine. *Id.* at 1275 n.1.

11. In the State of Hawaii, the Hawaii Intermediate Court of Appeals formally adopted the "plain feel" doctrine to justify the seizure of a gun, but the Hawaii Supreme Court affirmed the search on other grounds and found no need to reach the "plain feel" doctrine. *See State v. Ortiz*, 683 P.2d 822, 829 (Haw. 1984), *aff'g on other grounds*, 662 P.2d 517 (Haw. Ct. App. 1983).

S.W.2d 735, 737, 740 (Ark. Ct. App. 1991) (alternative basis for holding); *People v. Chavers,* 658 P.2d 96, 102 (Cal. 1983); *People v. Hughes,* 767 P.2d 1201, 1205-06 (Colo. 1989); *Doctor v. Florida,* 596 So. 2d 422, 444-46 (Fla. 1992) (held that seizure of an object during a pat search is proper if the officer develops probable cause during the stop and frisk, but found that initial stop in case was improper); *State v. Lee,* 520 So. 2d 1229, 1233 (La. Ct. App. 1988); *State v. Vanacker,* 759 S.W.2d 391, 393-94 (Mo. Ct. App. 1988); *State v. Vasquez,* 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied,* 815 P.2d 1178 (N.M. 1991) (recognized "plain touch" exception but did not find it applicable in the instant case); *Ruffin v. Commonwealth,* 409 S.E.2d 177, 179-80 (Va. Ct. App. 1991);[12] *State v. Richardson,* 456 N.W.2d 830, 836-39 (Wis. 1990).

In several of the jurisdictions where seizures based upon the sense of touch were affirmed, the facts surrounding the touching and seizure are virtually identical to the pat down and seizure in this case. *See, e.g., Salazar,* 945 F.2d at 48 (officer "squeezed the outside of the pocket and . . . felt the crackling of plastic"); *Ceballos,* 719 F. Supp. at 122 (officer "felt a large bulge" inside the suspect's jacket); *Pace,* 709 F. Supp. at 951 (officer felt two hard objects on the defendant's back that he identified through the "clothing as having the size and shape of two kilos of cocaine packaged in the form of 'bricks'"); *People v. Thurman,* 257 Cal. Rptr. 517, 521-22 (Cal. Ct. App.

12. In a later decision, the Virgina Supreme Court considered a similar case involving a seizure based upon an officer's feel of an item, but held that the seizure was improper because the officer only had a "hunch," not probable cause, to believe that the object was a controlled substance. *See Harris v. Commonwealth,* 400 S.E.2d, 191, 195-96 (Va. 1991).

1989) (believing that object was gun, officer stuck his hand inside jacket pocket, squeezed the object and realized it was "rock cocaine" in a baggie); *People v. Lee,* 240 Cal. Rptr. 32, 34, 37 (Cal. Ct. App. 1987) (officer patted chest area of defendant with a "gripping or 'claw type' motion" and "felt a clump of small resilient objects" that he believed were heroin-filled balloons); *Hughes,* 767 P.2d at 1203 (officer felt a "hard cylindrical object" and pulled out a film canister containing cocaine); *Doctor,* 596 So. 2d at 444-45 (officer who had felt crack cocaine over 800 times, felt plastic bag with "peanut brittle type feeling in it" which he "equated to the texture of rock cocaine"); *State v. Bearden,* 449 So. 2d 1109, 1116 (La. Ct. App. 1984), *writ denied,* 452 So. 2d 179 (La. 1984) (officers "felt an object, which was obviously not a weapon, but which could be *tactilely* identified as a large quantity of pills").

Several of the above-cited courts that have supported the "plain touch" exception, have also held that the seizure of the contraband was justified as part of a search incident to arrest. Under this alternate rationale, it is not unreasonable for the police to conduct the search and seizure of the object *before* a formal arrest where probable cause obtained from the touch of the object justified the arrest of the suspect. *See Ceballos,* 719 F. Supp. at 128; *Pace,* 709 F. Supp. at 956-57; *Jackson,* 804 S.W.2d at 740; *Thurman,* 257 Cal. Rpt. at 522; *Bearden,* 449 So. 2d at 1116.

State Courts that have Rejected the "Plain Feel" Exception

In addition to Minnesota, appellate courts in five other states have held that police are not entitled to seize an object during a pat down search even though, as a result of

their touching of the object, they have reasonably ascertained that the object is a controlled substance. *See McDaniel v. State*, 555 So. 2d 1145, 1147 (Ala. Crim. App. 1989), *cert. denied*, 111 S.Ct. 43 (1990); *State v. Collins*, 679 P.2d 80, 81-84 (Ariz. Ct. App. 1983); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okl. Crim. App. 1990); *Commonwealth v. Marconi*, 597 A.2d 616, 621-24 (Pa. Super. Ct. 1991) (item not sufficiently distinguishable); *State v. Broadnax*, 654 P.2d 96, 101-03 (Wash. 1982).

State Courts that are Divided on the Constitutionality of the "Plain Feel" Exception

In two states, appellate courts are divided as to whether probable cause for a seizure during a *Terry* search can be based upon the sense of touch. *Compare Anderson v. State*, 553 A.2d 1296, 1300 (Md. Ct. Spec. App. 1989) (although holding that seizure of stolen property was improper, court indicated that it would have been permissible if the officer had "felt the contents of the pocket from outside" the clothing before he put his hand into the pocket) with *Alfred v. State*, 487 A.2d 1228, 1239-40 (Md. Ct. Spec. App. 1985) (police cannot seize objects they know are not weapons, even if their sense of touch has identified the objects as stolen property); *compare In re Marrhonda G.*, 575 N.Y.S.2d 425, 429-31 (Fam. Ct. 1991) (applied "plain touch" doctine to police touching of bag) *with In re James L.*, 519 N.Y.S.2d 675, 676 (App. Div. 1987) (police could not seize cocaine during weapons search even though they knew from patting the suspect's pocket that it contained cocaine).

Although the federal circuit courts of appeals have uniformly accepted the "plain feel" doctrine, there is great

disparity in the way the state courts have viewed the constitutionality of this doctrine. Evidence that would be admissible in federal courts is repeatedly being suppressed in state courts on federal constitutional grounds. Inconsistency both within the states and between the states has left the law on this federal question in confusion. This Court's review of the Minnesota Supreme Court's decision is necessary to clarify this important issue of federal constitutional law.

CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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June 18, 1992

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C9-90-1780

Court of Appeals

Tomljanovich, J.

Concurring in part, Dissenting in part,
Coyne, Simonett, JJ. and Keith, C.J.

State of Minnesota, petitioner,
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vs.

Timothy Eugene Dickerson,
Appellant,

Filed: March 20, 1992
Office of Appellate Courts

SYLLABUS

(1) There is no "plain feel" exception to the warrant requirement of the fourth amendment.

(2) When a police officer carrying out a *Terry*-style protective weapons search feels an object in a suspect's clothing that cannot possibly be a weapon, s/he is not privileged to pinch, squeeze, twist or otherwise manipulate the object to determine what it is.

Affirmed.

Considered and decided by the court en banc without oral argument.

OPINION

TOMLJANOVICH, Justice.

This case presents the question of whether a police officer executing a warrantless protective weapons search may seize an object from a detainee's pocket based on the officer's perception that although the object is not a weapon, it feels like contraband. The trial court held in the affirmative and the court of appeals reversed. *State v. Dickerson*, 469 N.W.2d 462 (1991). We affirm.

After a trial on essentially stipulated facts from the omnibus hearing, defendant was convicted in Hennepin County District Court of fifth degree possession of a controlled substance, crack cocaine. Police found the cocaine in the defendant's jacket pocket during a pat search for weapons. The trial court denied the defendant's motion to suppress the evidence, ruling that the stop was justified under *Terry v. Ohio*, 392 U.S. 1 (1968), and that seizure of the cocaine was justified under a "plain feel" exception to the fourth amendment warrant requirement. A unanimous court of appeals panel found the stop justified but reversed on the "plain feel" issue. The state appeals from that decision and the defendant cross appeals on the validity of the stop.

Shortly after 8 p.m. on November 9, 1989, two Minneapolis police officers were on patrol in a marked squad car in North Minneapolis. At 8:15 p.m., while driving southbound on Morgan Avenue North, the officers saw a man leaving a multi-unit apartment building. The man later was identified as the defendant. The officers were suspicious because one had executed search warrants at the building and had found drugs and weapons. He testified that he also had been called to the building to investigate complaints of drug sales in the hallways. The officer said the apartment building was known as a 24-hour-a-day crack house, and police were monitoring it, especially after receiving a complaint from the local alderman.

The officer testified that the defendant came down the stairs from the building and started to walk toward the street until he saw the squad car and made eye contact with the officer. The defendant then stopped, turned around, walked back three to five feet and took a sidewalk around the side of the house to the alley. The defendant testified that he never saw the police car on Morgan Avenue, never made eye contact with the officers and went directly from the apartment building to the sidewalk that leads to the alley. He said that he was on his way to a friend's house and the alley was the fastest route. The trial judge credited the officer's version and found that the defendant had turned abruptly after seeing police.

The officer testified that the defendant's change of direction made him suspicious, and he told his partner to pull the squad car into the alley, so he could "check [the defendant] for weapons and contraband." They drove into the alley, where the defendant was walking southbound. The officer, who never had seen the defendant before and knew of no criminal activity by him, confronted the defendant and ordered him to submit to a pat search.

The officer described the search as follows: "As I pat searched the front of his body, I felt a lump, a small lump in the front pocket [of the defendant's nylon jacket]. I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane." The officer then reached into the defendant's jacket pocket and pulled out what proved to be .20 grams of crack cocaine in a knotted sandwich-wrap bag. The confiscated material was described as the size of a pea or a marble.

The Stop

Warrantless searches "are *per se* unreasonable under the fourth amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the protective pat search for weapons. *Terry* holds that police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous. 392 U.S. at 30. If both of those factors are present, police may "conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault him." *Id.*

We have held that one circumstance giving rise to reasonable suspicion is evasive conduct. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). As the court of appeals and the defendant correctly point out, merely being in a high-crime area will not justify a stop. *See Brown v. Texas*, 443 U.S. 47, 52 (1979). But defendant's evasive conduct after eye contact with police, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity.

In this case, defendant denied making eye contact with the officer and denied making a sudden change in direction,

but the trial court, which had an opportunity to observe both the officer and defendant testify, credited the officer's testimony. We accord great deference to the trial court's determinations in this area. "The credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). We therefore agree with the trial court and the court of appeals that the stop was valid.

The Search

Because the stop was valid under *Terry*, police were justified in frisking the defendant if they reasonably suspected he could be armed and dangerous. In this case, the defendant's suspicious behavior, the history of drug activity in the immediate vicinity and Officer Rose's personal experience in seizing guns from the building the defendant left justified a pat search. The remaining issue is whether the search was "carefully limited" as *Terry* requires. The court of appeals held that police exceeded the scope of a *Terry* search. We agree and affirm.

While we give great deference to the trial court on factual determinations, that deference is not unlimited. The trial court's findings "will not be reversed upon review unless clearly erroneous or contrary to law." *State v. Gilbert*, 262 N.W.2d 334, 340 (Minn. 1977) (citations omitted). In evaluating the search in this case, the trial court made errors of fact and law, requiring a reversal of the defendant's conviction. When the correct law is applied to all of the facts, it is clear that the defendant's fourth amendment right to be free from unreasonable searches and seizures was violated. The pat search of the defendant went far beyond what is permissible under *Terry*. To conduct the type of search at issue in this case required a warrant, which police did not have. Therefore, the fruits of that

illegal search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

The trial court and the dissenting justices of this court would allow the seized evidence to be admissible under a "plain feel" exception to the fourth amendment warrant requirement. Neither this court nor the United States Supreme Court ever has recognized such an exception and we decline to do so today.

The trial court found that when the officer felt the defendant's jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine. The officer's "immediate" perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. We are led to surmise that the officer's sense of touch must compare with that of the fabled princess who couldn't sleep when a pea was hidden beneath her pile of mattresses. But a close examination of the record reveals that like the precocious princess, the officer's "immediate" discovery in this case is fiction, not fact.

The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he "immediately" knew what he had found. And this was not a case of some clever cross-examiner putting words in the officer's mouth; this was his own testimony on direct examination. Any doubts we might have about the trial court's findings are removed by another piece of information, also provided by the officer on direct examination. He testified that after observing the defendant engage in evasive behavior he directed his partner to stop the car so he could search the defendant for weapons and drugs.

It is true, as the dissent points out, that an improper motive does not invalidate an otherwise lawful search. *Horton v. California*, ___ U.S.___, 110 S.Ct. 2301, 2308-10 (1990). But the officer's testimony that he intended to conduct a warrantless search for drugs, combined with his testimony about squeezing, sliding and otherwise manipulating the contents of the defendant's pocket, convince us that he set out to flaunt the limitations of *Terry*, and he succeeded. The results of such a search cannot be admitted into evidence. *Terry* would be rendered meaningless if such conduct were allowed. If given long enough, most police officers, or civilians for that matter, could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket and figure out what is inside. But the fourth amendment doesn't permit that type of intrusive conduct without a warrant or probable cause to arrest, and police in this case had neither.

Terry permits a protective frisk for weapons. When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon. *See State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982); *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 95 (1975); *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981); 3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987).

The trial court held, and the dissent argues, that the officer's discovery should be admissible under a "plain feel" exception to the fourth amendment warrant requirement. The handful of courts that have applied a "plain feel" analysis have described it as an extension of the well-recognized "plain view" doctrine. *See State v.*

Washington, 396 N.W.2d 156, 161-62 (Wis. 1986); *United States v. Williams*, 822 F2d 1174 (D.C. Cir. 1987).[1]

Under plain view, if the sight of an object gives a police officer probable cause to believe the object is the fruit or instrumentality of a crime, it may be seized without a warrant, provided (1) police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *Horton*, 110 S.Ct. at 2308.

Because we do not believe the senses of sight and touch are equivalent, we decline to extend the plain view doctrine to the sense of touch. We reach this conclusion for two primary reasons. First, the sense of touch is inherently less immediate and less reliable than the sense of sight. For an excellent analysis on this point, *see State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982). But even more important, the sense of touch is far more intrusive into the personal privacy that is at the core of the fourth amendment. It is one thing to see a bag of marijuana in a suspect's pocket, as occurred in *Ludtke*. It is quite something else to pinch, squeeze and rub the suspect's pocket to see what might be inside. Observing something that is held out to plain view is not a search at all. *Hicks*, 480 U.S. at 325. Physically

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1. Even if we recognized a "plain feel" exception, the search in this case would not qualify. The Circuit Court for the District of Columbia, in adopting "plain feel," anticipated the type of abuse that occurred in the present case, saying: "[A]n officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents." *Williams*, 822 F.2d at 1184.

touching a person cannot be considered anything but a search.

The dissent also argues that we already have tacitly adopted a "plain feel" rule in previous cases. We do not believe that is the proper interpretation of our reasoning in upholding warrantless searches in those cases. In *Bitterman*, the officer felt a hard, round object that he couldn't immediately rule out as a weapon, so he seized it, and it turned out to contain contraband. In *Alesso*, as the officer approached a stopped car, he saw the defendant quickly move his hand into a pocket. Fearing for his safety, the officer reached into the defendant's pocket and grabbed what proved to be a soft plastic bag containing contraband.

The distinction between those cases and the present one is obvious. In *Bitterman*, the officer felt a hard object that might or might not have been or contained a weapon. Under those circumstances, the law does not require him to wait until the bullets are flying to be sure. He may continue his frisk until his safety is assured. So long as his continued concern for his safety is reasonable, if the hard object turns out to be or contain contraband, that item may legitimately be seized. Likewise, the officer in *Alesso* acted reasonably in heading off any possibility the suspect was drawing a weapon. He instinctively reached for the source of the threat and removed it, only to discover it was a soft bag containing contraband. This court held that under those circumstances, where the suspect made a seemingly aggressive move, the officer was justified in protecting himself by grabbing whatever it was the suspect was trying to reach. The law does not require an officer to carefully feel the item s/he is grabbing when s/he reasonably believes s/he might be in danger.

That is where the present case differs from *Alesso* and *Bitterman.* There was never any possibility that the object in the defendant's pocket was a weapon, and there was no justification for grabbing it as a matter of self-protection because the defendant never made an aggressive move. With *Bitterman* and *Alesso* not applicable, the dissent relies on *Ludtke* for the proposition that there are circumstances in which it is proper for police to seize an item during a frisk, even if it could not be a weapon and the suspect does not act aggressively. *Ludtke* shows that such circumstances can exist, but it does not change the fact that those circumstances do not exist in this case. During a pat search in *Ludtke,* the officer came across a plastic bag on Ludtke's person and seized it. It later proved to contain 11 grams of cocaine, 55 times the amount at issue in this case. This court said because the officer had seen a small bag of marijuana in Ludtke's pocket, he was justified in seizing the larger bag. The court never said why, but when the gap in the analysis is filled, it becomes clear why *Ludtke* is inapplicable to the present case.

As *Katz* points out, warrantless searches and seizures are automatically invalid unless they fall under a recognized exception. Two exceptions are applicable here: (1) the protective weapons frisk in *Terry* and (2) a search incident to arrest. *See Chimel v. California,* 395 U.S. 752, 763 (1969). Professor LaFave cites *Ludtke* for the proposition that although finding a soft object will terminate the officer's right to continue a pat search, the item may be subject to seizure on other grounds. 3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987).

The *Ludtke* court did not specify what those grounds were, but to be valid under *Katz* the other grounds have to be among the well-delineated exceptions to the fourth amendment. The *Ludtke* court acknowledged that soft

objects cannot be seized under the rationale of a *Terry* protective search. And contrary to the dissent's assertion, *Ludtke* should not be viewed as a "plain feel" case. First, "plain feel" is not a well-delineated exception to the fourth amendment. The Supreme Court never has recognized it and neither have we. Second, there is nothing in *Ludtke*'s facts to suggest that the officer discerned any texture that indicated to him what the bag contained. He knew he had come across a plastic bag but he never suggested he could tell what was inside it by its feel.

The best explanation for *Ludtke* is that based on all the circumstances, the seizure of the soft bag was justified because it occurred during a search incident to arrest. Before the frisk, the officer had seen a bag of marijuana in Ludtke's pocket. He also had found marijuana during a search of Ludtke's companion. He also observed Ludtke reaching furtively into the back seat of the car. Then the frisk of Ludtke revealed a knife. All of those circumstances, plus the presence of a plastic bag containing *anything* on Ludtke's body gave police probable cause to believe that Ludtke was in possession of a controlled substance, justifying a full search.

The present case is clearly distinguishable. Here, there was no visual sighting of contraband, no presence of a knife, no effort by the defendant to hide anything and no accomplice in possession of contraband. In short, there was nothing about the defendant or his conduct that would give the police probable cause to arrest him and justify the extensive search that was performed. Even accepting the State's version of the facts, all the police had, as a matter of law, was *Terry*-type reasonable suspicion. That entitled the officer to stop the suspect and, based on a reasonable suspicion that he might be armed, conduct a carefully limited frisk for weapons.

Once it was apparent that the defendant had no weapon, *Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither. Instead, he continued feeling the defendant's person until he found what he was looking for all along. That type of warrantless search is not permissible under the fourth amendment and its fruits must be suppressed.

The dissent notes that "law enforcement is not a game in which liberty triumphs whenever a policeman is defeated." We agree, but we are equally certain that liberty does triumph when the vitality of the fourth amendment is reaffirmed and an individual's basic right to be free from unreasonable searches and seizures is vindicated.

Affirmed.

COYNE, Justice (concurring in part, dissenting in part).

Because it seems to me that concluding that the "crack" cocaine discovered in the pocket of the defendant's jacket is the inadmissible product of an unreasonable search and seizure represents a departure from common sense and common experience, I respectfully dissent from that part of the decision which holds the trial court erred in admitting the contraband into evidence.

Officer Vernon Rose, the testifying police officer whose credibility as a witness the majority rather cavalierly questions, was in 1989 a 14-year veteran of the Minneapolis Police Department, with 11-1/2 of those years spent on the north side, and he had recently had extensive experience working on cases involving narcotics and weapons. At 8:15 p.m. on November 9, 1989, Rose and his partner, in a marked squad car, approached a notorious "crack house" in north Minneapolis. The building in question is a three-story 12-unit apartment building; it is not clear from the record how many of the units were then occupied. What is clear is that the building had become known, as Rose put it in his testimony at the pretrial suppression hearing, as a "crack house" that "goes 24 hours a day," a building which had been the subject of much complaint from the community, including "aldermanic complaint," and which had been raided by police on "numerous" occasions, with drugs and weapons (including knives, handguns and sawed-off shotguns) being seized.

Rose testified that as the squad car approached the crack house, he saw defendant emerge from the front entrance and walk toward the front sidewalk. When defendant looked up and made eye contact with the officer, defendant made an "abrupt * * * strange and suspicious" change in direction, apparently "just because he was a police car." As defendant headed toward the alley instead

of toward the street, the officers drove into the alley and stopped him. While subjecting defendant to a pat-down search of the outer clothing, here a thin nylon jacket, Rose felt a lump in defendant's jacket pocket. With the clothing still between his hands and the object, Rose "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Rose had "felt [crack] before in clothing" -- approximately 50 to 75 times -- and "was absolutely sure that's what it was, or I would have left it there."

Up to that point Rose had been "just patting the outside." However, upon detecting the presence of the lump which he was certain was crack cocaine, he reached into the pocket and seized the substance, which indeed was crack cocaine (.20 grams), and arrested defendant. This prosecution followed.

Defendant moved to suppress the crack cocaine, challenging the basis for the stop and for the pat-down search for weapons, contending that Rose impermissibly used the pat-down search for weapons as an excuse for contraband, and claiming, finally, that the "plain view" seizure doctrine does not allow seizure of drugs or other contraband felt during a pat-down search for weapons. The trial court rejected each of these arguments. It determined that there was objective reasonable suspicion justifying the stop, that Rose was justified in conducting a pat-down search for weapons, and that Rose was justified in reaching into the pocket of defendant's jacket and seizing the crack cocaine after properly identifying it by feel during the pat-down search.

The majority, as a prelude to explaining why it agrees with the court of appeals that suppression is required, accepts the trial court's conclusions that the officers were justified in stopping defendant and that Rose was justified in

conducting a pat-down search for weapons. I agree with both of these ultimate conclusions but offer a more detailed and somewhat different analysis of these issues to lay the ground work for my examination of the issue on which I formally dissent.

In *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989), we upheld a stop based upon a suspicious evasive act of driving: a person made a quick turn off the highway seconds after spotting a state trooper, then resumed driving on the highway within the next minute. We said, "While defendant's behavior may have been consistent with innocent behavior, it also reasonably caused the officer to suspect that defendant was deliberately trying to evade him." 444 N.W.2d at 827. Concluding that the officer had a "particular and objective basis for suspecting * * * criminal activity," we upheld the stop. *Id.*

Here Officer Rose saw not just an obviously evasive act by defendant but an obviously evasive act seconds after defendant left a notorious crack house and immediately on making eye contact with the officers, who were in a marked squad car. The stop was therefore clearly proper under *Johnson.*

In *Terry v. Ohio*, 392 U.S. 1, 23-27 (1968), the United States Supreme Court held, for the first time, that a police officer making an investigative stop may make a pat-down search of the suspect for weapons if the officer has a sufficient objective basis to believe that a pat-down search or frisk is necessary for self-protection. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27 (citation omitted).

This court has consistently followed the lead of the United States Supreme Court. For example, in *State v. Bitterman*, 304 Minn. 481, 232 N.W.2d 91 (1975), police patted down the defendant when he arrived at a residential heroin outlet which was then being searched by police pursuant to a search warrant. We upheld the limited search because of the fact that the defendant was a known user of heroin, a very dangerous drug, the fact that the defendant walked in on the police when they were searching the apartment for heroin, the fact that other known users were present, and the testimony of the officer, who had made approximately 3,000 narcotic arrests, that it was common for narcotics users to carry weapons. Similarly, in *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987), while upholding the pat-down search of the defendant and two others stopped at 3:00 a.m. in a high crime area for investigation of their involvement in an attempted break-in of a nearby residence moments earlier, we quoted Professor LaFave's statement that courts have been inclined to view the right to pat-down as automatic "whenever the suspect has been stopped * * * [for] a type of crime for which the offender would likely be armed * * * [including] such suspected offenses as robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics." 406 N.W.2d at 513 (quoting 3 W. LaFave, *Search and Seizure* § 9.4(a) at 506 (1987)).

Ultimately the resolution of the question of the sufficiency of the basis for a protective pat-down search depends on the facts and circumstances of each individual case. The test, as I have already indicated, is an objective test which looks only at whether there was an objective basis for a limited search, not into the officer's motivation. As we put it in *State v. Pleas*, 329 N.W.2d 329, 332 (Minn. 1983):

> Under the 'objective theory' of probable cause which the United States Supreme Court has adopted, a search must be upheld, * * * if there was a valid ground for the search, even if the officers conducting the search based the search on the wrong ground or had an improper motive. *See Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), discussed in 1 W. LaFave, *Search and Seizure* § 1.2(g) (Supp. 1982), and relied upon by this court in a number of cases, including *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981), and *State v. Veigel*, 304 N.W.2d 900 (Minn. 1981). *The same rule applies to police investigatory practices short of arrest or search.*

(Emphasis added). Thus, the fact that Officer Rose candidly admitted that he hoped to find drugs in the pat-down search does not answer the question whether or not the search was justified. Instead, justification must be found in objective facts existing at the time of the search and articulated by the officer at the suppression hearing.

Here, although there was no objective basis for suspicion that defendant was dealing in large quantities of narcotics, Officer Rose was justified in suspecting that defendant was at least in possession of or using crack cocaine based on his observation of defendant's conduct -- leaving a notorious crack house and abruptly turning and walking in the other direction upon seeing the officers in the marked squad car. The officer's reasonable suspicion that defendant was a crack user, together with the other circumstances -- the fact that weapons had often been found during the several raids on the house, the fact the area was a high crime area, the fact defendant had acted in a furtive

manner, and the fact the stop occurred in a dark alley -- satisfy me that the trial court did not err in concluding that the officer was objectively justified in patting down defendant for weapons.

In his testimony Officer Rose said that while patting down defendant's outer clothing, a thin nylon jacket, he felt a lump in the pocket. With the clothing still between his hands and the object, Rose "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." The majority concludes that by examining the lump in this fashion Rose somehow exceeded the permissible scope of a lawful pat-down search for weapons. The case law, however, supports my conclusion that the limited search was not excessive in scope, or more precisely, not too intrusive. Once again, a resort to *Terry v. Ohio*, 392 U.S. 1 (1968), is in order. There Chief Justice Warren made clear the bright line dividing a limited pat-down search or frisk from a more intrusive full search of the person. A pat-down search or frisk is, as the Court put it, a "*careful* exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons * * * *." *Id.* at 16 (emphasis added). As the Court made clear in the companion case of *Sibron v. New York*, 392 U.S. 40, 65 (1968), if an officer invades the suspect's clothing and puts his or her hands into the suspect's pockets or otherwise reaches inside the outer clothing in order to examine an object, the search is no longer the limited search approved in *Terry*. As I said, Officer Rose testified here that he "examined [the lump] with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while

patting down previous suspects, he was "absolutely sure" that the substance was crack cocaine "before" he reached into the pocket and removed it. The trial court, as factfinder, credited Rose's testimony, expressly finding that Rose felt the crack cocaine as part of the pat-down search for weapons and that "[b]ased upon his training and experience, Officer Rose formed the opinion that the object in defendant's pocket was crack/cocaine and removed it."

The majority makes light of Rose's testimony on this point, comparing the officer to the fabled princess who felt the pea placed under a stack of mattresses. Although the majority then goes on to make it clear that its skepticism concerning Rose's credibility on this point is irrelevant to its ultimate conclusions, I believe that, in fairness to Officer Rose, the characterization of his testimony as fiction ought not to go unchallenged. Officer Rose was not trying to feel something hidden under a stack of mattresses; he was patting down a thin nylon jacket. Furthermore, as we have observed time and again, trained, experienced, intelligent police officers often detect and perceive criminal acts that might elude the rest of us. In any event, the trial court, the appropriate factfinder in our system, had the opportunity to observe the demeanor of Officer Rose and expressly credited his testimony on this point. In short, the finder of fact found the testimony to relate fact not fiction, and I can find no basis for rejecting the trial court's determination of credibility.

In order to seize an object without a warrant pursuant to the "plain view" seizure doctrine, the officer must be acting lawfully when he or she discovers the object. Further, it must be "immediately apparent" to the officer that the object is contraband, incriminating evidence or something else of a seizable nature -- *i.e.*, the officer must have probable cause to believe the object is contraband or

some other item subject to seizure. *Horton v. California*, 110 S.Ct. 2301, 2308 (1990).[1] The discovery of the object need not be "inadvertent." *Id.* at 2308-10. "The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." *Id.* at 2309. Thus, the fact that Officer Rose was looking for or hoping or expecting to find crack cocaine during the pat-down search for weapons does not invalidate its seizure.

Defendant contends, however, and the majority of this court so holds, that since the crack cocaine was discovered by the sensation of touch during a pat-down search rather than by the sensation of sight -- that is, by "plain feel" instead of "plain sight" -- it was unjustified. In fact, despite the majority's reluctance to admit it, we have relied on the plain view seizure doctrine in a number of cases to uphold police conduct similar to that of Officer

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1. *Arizona v. Hicks*, 480 U.S.321 (1987), cited by the majority, is not on point. There the police, after coming upon a stereo in plain view during the course of a search of an apartment, picked up the stereo in order to check the serial number and see if the stereo was stolen. The United States Supreme Court held that this movement of the stereo in order to view the serial number amounted to a seizure of the object and that absent probable cause this seizure was unjustified under the "plain view" seizure exception -- *i.e.*, that the police could not seize the object in order to find probable cause for the seizure. The majority in this case argues that by feeling the shape and outline of the lump, Officer Rose exceeded the proper scope of a pat-down search without probable cause. I believe that the United States Supreme Court will continue to rely on the bright line of *Terry* as to the scope and degree of intrusion permitted in a pat-down search for weapons and will not rely on *Hicks* in an attempt to modify the *Terry* rule.

Rose. The leading such case is *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981). A trooper stopped a car in which Ludtke was the passenger. When the driver could not produce identification papers, the trooper began to question Ludtke pursuant to standard procedures to verify the identification of the driver. While talking with Ludtke, the officer spotted a bag of marijuana sticking out of his shirt pocket. He seized this, then subjected the driver to a pat-down search for weapons and found more marijuana on him. He then subjected Ludtke to a pat-down search for weapons and found more marijuana on him. He then subjected Ludtke to a pat-down search for weapons and found a knife and a bag of cocaine. With respect to the pat-down search of Ludtke and the seizure of the bag of cocaine, we said:

> We need not decide in this case whether the frisk of defendant's person could be justified on the ground that the officer had probable cause to believe he would find more drugs on defendant's person. In this case, the frisk was clearly justifiable as a limited protective weapons search, * * *. *While the plastic bag of powder was soft and presumably did not feel like a weapon through the clothing, [the officer] was justified in reaching in and seizing it because he had already found a plastic bag of marijuana in the other shirt pocket and therefore could assume that this packet which he had felt also contained drugs.* After he removed the packet and saw that it indeed was suspected cocaine, he certainly was justified in seizing it and arresting defendant.

Id. at 113 (citations omitted) (emphasis added).[2]

The rule that emerges from *Ludtke* and similar cases is (a) if while patting down a suspect for weapons the officer feels an object and concludes that it is not a weapon, the officer *generally* may not reach in and remove the object but (b) if because of the feel of the object and other circumstances it is immediately apparent that the object, although not a weapon, is contraband, then the officer may seize it pursuant to the plain view seizure doctrine.

Professor LaFave cites *Ludtke* as the main authority for the following statement supporting the officer's conduct in this case:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable case.*

3 W. LaFave, *Search and Seizure* § 9.4(c) at 524 (2d ed. 1987) (emphasis added).[3]

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2. *See also State v. Gobely*, 366 N.W.2d 600, 602-03 (Minn.), *cert. denied*, 474 U.S. 922 (1985); *State v. Alesso*, 328 N.W.2d 685, 689 (Minn. 1982); *State v. Cavegn*, 294 N.W.2d 717, 722 (Minn.), *cert. denied*, 449 U.S. 1017 (1980).

3. The majority states: "Professor LaFave cites *Ludtke* for the proposition that although finding a soft object will terminate the officer's right to continue a pat search, the item may be subject to seizure on other grounds." The quote from the treatise in the text of this dissent more accurately presents Professor LaFave's approving analysis of *Ludtke*.

Other courts have reached the same conclusion. *See, e.g., United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989) (upholding "plain feel" seizure), and *State v. Washington*, 396 N.W.2d 156, 161-62 (Wis. 1986) (holding that plain view rule is not limited to seizure of items discovered in plain view but also includes items discovered through the use of other senses, including touch, and holding further that "[t]hough a pat-down provides no justification to search for evidence of a crime, it does not mean that the police must ignore evidence of a crime which is * * * discovered" during pat-down).

My opinion in this case is also supported fully by the decisions of the United States Supreme Court. For example, the Court has said that if, while conducting a so-called *Terry* "frisk" (protective weapons search) of an automobile, the officer "should, * * * discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (citations omitted). *See also Texas v. Brown*, 460 U.S.730, 739 (1983), stating that plain view seizure doctrine "reflects the fact that requiring police to obtain a warrant once they have obtained *a first-hand perception* of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience,'" * * *. (Emphasis added). (Citation omitted).

In summary, the officer did not violate defendant's fourth amendment rights in discovering and seizing the crack cocaine. The objective facts articulated by the officer at the pretrial suppression hearing justify not only the stop-to-investigate but also the protective pat-down search for weapons. As the trial court determined, the officer felt the crack cocaine during a properly conducted limited search

and, given the feel of the object and all the relevant surrounding circumstances, had probable cause to believe that the object was seizable contraband. Pursuant to decisional authority of both the United States Supreme Court and this court, that first-hand perception justified reaching into the pocket of defendant's jacket, seizing the object, and arresting defendant for illegal possession of a controlled substance.

It is well to remind ourselves occasionally that "[l]aw enforcement is not a game in which liberty triumphs whenever the policeman is defeated." E. Barrett, *Exclusion of Evidence Obtained by Illegal Searches -- A Comment on People v. Cahan*, 43 Calif L. Rev. 565, 582 (1955). Certainly, evidence obtained as the result of any unreasonable search or seizure should be excluded. But a policeman should not be compelled to ignore what his senses -- whether sight, sound, smell, taste, or touch -- tell him in clear and unmistakable language.

KEITH, Chief Justice (dissenting).
I join Justice Coyne's dissent.
SIMONETT, Justice (dissenting).
I join Justice Coyne's dissent.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

C9-90-1780

Hennepin County Amundson, Judge

Filed: April 30, 1991
Office of Appellate Courts

STATE OF MINNESOTA,
Respondent,

Hubert H. Humphrey, III
Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Michael Freeman
Hennepin County Attorney
Beverly J. Wolfe
Assistant County Attorney
C-2000 Government Center
Minneapolis, MN 55487

vs.

TIMOTHY E. DICKERSON,

Appellant.

William Kennedy
Hennepin County Public
Defender
Peter W. Gorman
Assistant Public Defender
317 Second Avenue South
#200
Minneapolis, MN 55401

SYLLABUS

1. An investigatory stop and pat search require specific articulable facts which reasonably warrant an officer's belief a crime is being or has been committed.

2. Absent probable cause to arrest, an officer may exceed the scope of a limited pat search only for the purpose of recovering an object thought to be a weapon.

Reversed.

Considered and decided by Schumacher, Presiding Judge, Amundson, Judge, and Mulally, Judge.*

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* Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

OPINION

Appellant Timothy Dickerson was charged with possession of a controlled substance in the fifth degree. He challenged the admission of the crack cocaine seized by a police officer. After an evidentiary hearing, the trial court held the stop and search of appellant was justified. The trial court also held seizure of the crack was valid based on the plain feel exception to the warrant requirement. We reverse.

FACTS

On November 9, 1989, at approximately 8:15 p.m., Minneapolis police officers Vernon D. Rose and Bruce S. Johnson were patrolling the 1000 block of Morgan Avenue North in a marked patrol car. Rose is a 14-year police veteran and has participated in approximately 75 drug search warrant executions and 50-75 drug-related arrests. Rose described the 12-unit apartment building at 1030 Morgan Avenue North as a "known crack house." He previously executed several drug-related search warrants at the address. Drugs, guns, and knives were seized during the searches.

Rose saw appellant Timothy Dickerson leaving the Morgan Avenue apartment building. Rose neither recognized Dickerson nor identified which apartment Dickerson left. According to Rose, Dickerson walked down the stairs and continued toward the sidewalk. Dickerson then made eye contact with Rose, immediately turned around, and began walking toward a side alley. Rose described Dickerson's movement as "abrupt".

Rose decided to stop Dickerson based upon his knowledge of past activities at the Morgan Avenue apartments and Dickerson's abrupt direction change. Rose admitted he did not suspect Dickerson of criminal activity before Dickerson's direction change.

The officers pulled into the alley and stopped Dickerson. Dickerson made no evasive movements and did not attempt to conceal anything. Rose did not notice any suspicious bulges in Dickerson's clothing. Dickerson, in contrast, testified he left the building and turned immediately toward the sidewalk leading to an alley. He denied making eye contact with Rose or making an abrupt direction change. Dickerson indicated he did not see the squad car until it drove toward him in the alley.

After stopping Dickerson, Rose performed a pat search. He testified he searched Dickerson because other weapons had been seized from people at the Morgan Avenue apartments. He also indicated that in his experience, drug traffickers often possess weapons.

During the pat search, Rose felt a small lump in the front pocket of Dickerson's nylon jacket. He examined the lump through the nylon with his fingers. Later he claimed that based upon his experience he knew immediately the lump was crack cocaine tied in cellophane wrap. He seized the crack cocaine and arrested Dickerson. Rose never thought the lump was a weapon.

The trial court concluded Dickerson's departure from a "known crack house" and his evasive conduct provided reasonable suspicion he was engaged in criminal activity. The trial court also found the police officer's pat search was justified based upon prior seizure of weapons in the area and Dickerson's conduct. Finally, the trial court held the crack seizure valid based upon a "plain feel" exception to the warrant requirement.

ISSUES

1. Was the stop justified?
2. Did the police have an articulable factual basis to believe Dickerson may have been armed and dangerous?

3. May the state justify the seizure under a "plain feel" exception to the warrant requirement?
4. May the state justify the seizure based upon a search incident to arrest theory not presented to the trial court?

ANALYSIS

I.

Whether the stop in this case was valid is purely a legal determination on given facts. Hence we analyze the testimony of the officer and determine whether his observations provided an adequate basis for the stop. *Berge v. Commissioner of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

Dickerson contends the police performed an unconstitutional investigative stop. The state argues the police properly stopped Dickerson pursuant to *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The trial court upheld the stop's validity.

The fourth amendment protects the peoples' right against unreasonable searches and seizures. U.S. Const. amend. IV. Seizures conducted without a warrant are per se unreasonable unless one of the exceptions to the warrant requirement is applicable. *See United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641 (1983).

One exception to the general warrant rule permits officers to stop and frisk an individual "for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880. Both parties agree a fourth amendment seizure occurred, but dispute the stop's validity under *Terry*.

An investigatory stop and frisk may be performed when law enforcement officers have a reasonable suspicion criminal activity "may be afoot." *Id.* at 30, 88 S. Ct. at

1884. Reasonable suspicion requires "specific articulable facts which, taken with rational inference from those facts, reasonably warrant" the belief a crime is being or has been committed. *Id.* at 21, 88 S. Ct. at 1879-80. An officer's suspicion must be evaluated "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 419, 101 S. Ct. 690, 696 (1981). A trained police officer is entitled to draw inferences on the basis of "all of the circumstances *** inferences and deductions that might well elude an untrained person." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989) (quoting *Cortez*, 449 U.S. at 418, 101 S. Ct. at 695).

We conclude Dickerson's stop was justified. First, evasive conduct alone has been held to justify an investigative stop. *Johnson*, 444 N.W.2d at 826-27. Dickerson's abrupt turn around after making eye contact with Rose plainly indicates evasive behavior. Further, Rose had personal knowledge of significant drug activity in the hallways of the Morgan Avenue apartment complex. Moreover, the stop was not based solely on Dickerson's presence in a high crime area. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641 (1979). Under these circumstances, the trial court did not err in concluding the stop was constitutionally justified.

II.

An officer may conduct a pat search of a lawfully stopped person if the officer has an objective, articulable basis for thinking the person may be armed and dangerous. *Wold v. State*, 430 N.W.2d 171, 175 (Minn. 1988). However, if the true goal of the search is discovery or preservation of contraband rather than weapons, the intrusion is not authorized. *See United States v. Gonzalez*, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985). Our inquiry

therefore is whether Rose possessed a reasonable belief based on specific and articulable facts that Dickerson was dangerous and might gain immediate control of a weapon.

We conclude Rose had an articulable objective basis to perform a limited pat search. Rose previously seized drugs and weapons from the Morgan Avenue apartments. Rose also testified from experience that drug possessors often carry weapons. Dickerson's departure from a "known crack house," his evasive conduct, and Rose's experience with weapon-carrying drug traffickers provided specific and articulable facts to justify the pat search.

We conclude, however, the scope of the pat search exceeded constitutional parameters. The *Terry* analysis includes the principle that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878. A search's scope must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Id.* at 19, 88 S. Ct. at 1878.

Terry described the rationale and scope of a pat search:

> The sole justification of the search * * * is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Id. at 29, 88 S. Ct. at 1884. *Terry* upheld the search before it, but carefully noted that the officer:

> confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a

general exploratory search for whatever evidence of criminal activity he might find.

Id. at 30, 88 S. Ct. at 1884.

In a companion case to *Terry*, the Supreme Court reversed a heroin possession conviction and emphasized the limited scope of a pat search. The Court noted:

> The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception--the protection of the officer by disarming a potentially dangerous man. Such a search violates the guaranty of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Sibron v. New York, 392 U.S. 40, 65-66, 88 S. Ct. 1889, 1904 (1968).

We read *Terry* and *Sibron* as limiting pat searches to a careful exploration of the outer surfaces of the person's clothing until and unless the officer discovers specific and articulable facts reasonably supporting the suspicion that the defendant is armed and dangerous. Absent probable cause to arrest, the officer may exceed the scope of a limited pat search and reach into the suspect's clothing only for the purpose of recovering an object thought to be a weapon.

The Minnesota Supreme Court has also emphasized the limited scope of a pat search.

> In a typical pat-down frisk, only certain "tactile sensations produced by the pat-down will justify a further intrusion into the clothing" to seize the object and the "better view" is that "a search is

> not permissible when the object felt is soft in nature."

State v. Alesso, 328 N.W.2d 685, 688 (Minn. 1982) (quoting 3 W. LaFave, *Search and Seizure*, § 9.4(c) at 130 (1978); *e.g.*, *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 94 (1975) (seizure of prescription bottle, which was a hard object that, when felt through the clothes, the officer thought might be a weapon was justified); *State v. Gannaway*, 291 Minn. 391, 394, 191 N.W.2d 555, 557 (1971) (pipe reasonably thought to be a weapon). *Accord State v. Collins*, 139 Ariz. 434, 438, 679 P.2d 80, 84 (Ariz. App. 1983) (officer may seize only weapons during "stop and frisk" weapons search, not any and all suspicious items discovered); *People v. Collins*, 1 Cal. 3d 658, 664, 83 Cal. Rptr. 179, 182, 463 P.2d 403, 406 (1970) (officer exceeded scope of pat down weapon search where no articulable facts indicated suspect was armed with an atypical weapon similar to the object felt); *People v. McCarty*, 11 Ill. App. 3d 421, 422, 296 N.E.2d 862, 863 (1973) (officer had no right to remove a soft plastic bag from defendant's coat pocket, after determining pocket did not contain a weapon); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990) (officer may not seize object felt in pat down search unless it reasonably resembles a weapon); *State v. Hobart*, 94 Wash. 2d 437, 447, 617 P.2d 429, 434 (1980) (pat down search was illegal where its scope was not strictly limited to a search for weapons, but included an exploration the defendant might be in possession of narcotics).

We hold that the scope of a pat down search must be strictly limited to a search for weapons. Absent probable cause for further intrusion, an officer performing a proper *Terry* frisk may not seize an object unless it reasonably

resembles a weapon. Consequently, the trial court erred in concluding Rose's seizure of the cocaine was constitutional.

III.

The trial court concluded the plain feel exception to the traditional warrant requirement justified the seizure of the cocaine. We disagree, and in so doing, decline to adopt the plain feel exception in Minnesota.

Courts that have addressed the "plain feel" issue have treated it as a corollary to the plain view doctrine. *See United States v. Williams*, 822 F.2d 1174, 1181-83 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295 (4th Cir.) *cert. denied*, 464 U.S. 820, 104 S. Ct. 82 (1983); *United States v. Russell*, 655 F.2d 1262 (D.C. Cir. 1981), *vacated and modified in part*, 670 F.2d 323 (D.C. Cir.), *cert. denied*, 457 U.S. 1108, 102 S. Ct. 2909 (1982); *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981); *United States v. Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043, 101 S. Ct. 1764 (1981); *United States v. Diaz*, 577 F.2d 821, 824 (2d Cir. 1978).

Courts invoke the plain view exception when an officer engaged in a lawful search views an object which he or she had probable cause to believe was contraband. The plain view exception is justified because apprehension of an object already in plain view of an officer lawfully present does not infringe any reasonable expectation of privacy, and "its exposure thus is not a search within the meaning of the Fourth Amendment." *United States v. Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987).

We decline to adopt a plain feel exception to the warrant requirement. We believe the proper analysis in this case must focus upon the limited purpose associated with a pat search. We conclude the search of Dickerson exceeded constitutional parameters and we therefore reverse.

IV.

The state argues for the first time on appeal that the search was justified as incident to an arrest. A search is valid as incident to arrest even if conducted before the actual arrest provided (1) the arrest and the search are substantially contemporaneous; and (2) probable cause to arrest existed before the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 s. ct. 2556, 2564 (1980); *United States v. Costello*, 604 F.2d 589, 590-91 (8th Cir. 1979).

The state, however, did not argue this theory to the trial court. The record indicates the state argued only a "plain feel" analysis. At oral argument, the state admitted it failed to present the search incident to arrest theory to the trial court. Parties cannot raise for the first time on appeal issues not presented to the trial court. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989).

DECISION

The trial court did not err by concluding the police officers properly stopped appellant. However, the pat search of appellant by the police officer exceeded constitutional parameters. We decline to adopt the plain feel exception to the warrant requirement.

Reversed.

Dated: April 24, 1991

ROLAND C. AMUNDSON
Judge of the State Court
of Appeals

APPENDIX C

State of Minnesota
Hennepin County

District Court
Fourth Judicial District

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

File No. 89067687

STATE OF MINNESOTA,

Plaintiff,

vs.

TIMOTHY EUGENE DICKERSON,

Defendant,

The above-entitled matter came on before the undersigned February 20, 1990, upon defendant's motion to dismiss for lack of probable cause. The State of Minnesota was represented by Gail Baez, Esq., and the defendant was represented by Mary Moriarty, Esq. Based upon the testimony produced at the hearing, the arguments of counsel and briefs submitted, the Court makes the following:

FINDINGS OF FACT

1. At approximately 8:15 p.m., on November 9, 1989, Officer Rose of the Minneapolis Police Department

was on routine patrol in his squad in the area of 10th and Morgan Avenue North in the City of Minneapolis, Hennepin County.

2. Rose is a 14-year veteran of the Department, having served 11 1/2 years in North Minneapolis. Over the past two years, he has participated in approximately 75 drug search warrant executions and made between 50 and 75 drug arrests.

3. Officer Rose had personally participated in search warrants at the address at 1030 Morgan Avenue North resulting in drug seizures as well as seizures of guns and knives.

4. Officer Rose had personally responded to complaints at this address of drugs being sold in the hallways.

5. On the evening in question, Officer Rose observed the defendant, a man unknown to him, come out of the front door of the address at 1030 Morgan Avenue North and walk towards the street. Officer Rose observed that when the man saw the squad car, he made an abrupt turn and walked towards the alley.

6. Rose and his partner drove into the alley where they stopped defendant.

7. Officer Rose conducted a pat search of the defendant for weapons. Officer Rose felt a small, hard object wrapped in plastic in defendant's pocket.

8. Based upon his training and experience, Officer Rose formed the opinion that the object in defendant's pocket was crack/cocaine and removed it. Subsequent testing revealed this to be .20 grams of crack/cocaine.

CONCLUSIONS OF LAW

1. Officer Rose had a reasonable suspicion based upon objective facts that defendant was involved in criminal activity.

2. Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley.

3. Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in defendant's pocket and this seizure was reasonable.

ORDER

1. Defendant's motion to suppress is denied.

2. Defendant's motion to dismiss for lack of probable cause is denied.

3. The Court finds that probable cause exists that a crime was committed and defendant committed it.

Let the attached memorandum be made part of this Order.

Dated: 3/6/90

BY THE COURT:

ROBERT H. LYNN
Judge of District Court

MEMORANDUM

When Officer Rose detained defendant for the purpose of investigating, he performed a seizure within the confines of the Fourth Amendment. The reasonableness of this seizure depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms,* 434 U.S. 106 (1977). The Fourth Amendment requires that such a seizure must be based upon a reasonable suspicion based on objective facts, that the individual is involved in criminal activity. *Delaware v. Prouse,* 440 U.S. 648 (1979) and *Terry v. Ohio,* 392 U.S. 1 (1968). In this case, Officer Rose observed the defendant coming out of a known crack house at approximately 8:15 p.m. When defendant saw the squad car, he made an abrupt turn and rather than continuing his walk toward the street where the squad car was located, went behind the house toward the alley. These objective facts, when viewed from the perspective of a trained officer who was very familiar with the drug activity at this address, support a reasonable suspicion that defendant was engaged in criminal activity. See *State v. Gobely,* 366 N.W.2d 600 (Minn. 1985), *State v. LaMar,* 382 N.W.2d 266 (Minn. App. 1986) and *State v. Johnson,* 444 N.W.2d 824 (Minn. 1989).

The facts here are distinguishable from those in *Brown v. Texas,* 99 S.Ct. 2637, 443 U.S. 47 (1979). In *Brown, supra,* the United States Supreme Court held that an officer's observation of two men walking away from each other at noon in an alley in an area known for drug activity did not support the subsequent stop. The officer in *Brown* observed activity which was no different from that of any other pedestrian in the neighborhood. Officer Rose, in contrast, based his suspicion upon the fact that defendant was walking out of a notorious "crack house" at 8:15 p.m.,

and made an abrupt change of direction when he observed the squad car.

Once Officer Rose stopped the defendant, was he justified in conducting a pat search for weapons? *Terry* requires a separate basis for such a search, namely articulable facts which support a belief that defendant was armed or dangerous or otherwise presented a danger to the officers. Here, Officer Rose, based upon his personal experience with the crack house defendant had been seen leaving, knew that guns and knives had been seized there. This knowledge, coupled with the stop in a dark alley, supports his decision to conduct the pat search for weapons.

During the pat search, Officer Rose felt an object he concluded was crack/cocaine based upon the feel of the object and the feel of the plastic wrapping. He makes no claim that he suspected this object to be a weapon, rather he removed the object from defendant's pocket in the belief it was contraband, namely cocaine.

This seizure raises a novel question. It is black letter law that an officer may seize contraband in "plain view." Here, Officer Rose made his determination that the object was contraband based upon his sense of touch, grounded in his experience with drug seizures and arrests.

To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

The stop, frisk and seizure of crack/cocaine here were not violative of defendant's constitutional rights.

R.H.L.

APPENDIX D

Minnesota Constitutional and Statutory Provisions

Minn. Const., art. 1, §10:

> **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be searched and the person or things to be seized.

Minnesota Statute § 152.025, subd. 2(1), subd. 3(a) (1989):

> Subd. 2. **Possession and other crimes.** A person is guilty of controlled substance crime in the fifth degree if:
>
> (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana . . . .
>
> * * *
>
> Subd. 3. **Penalty**. (a) A person convicted under subdivision 1 or 2 may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minnesota Statute § 152.18, subd. 1 (1989):

> If any person is found guilty of a violation of section 152.024, 152.025 or 152.027 for possession of a controlled substance, after trial or upon a plea of guilty, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for a period, not to exceed the maximum term of imprisonment provided for such violation. The court may give the person the opportunity to attend and participate in an appropriate program of education regarding the nature and effects of alcohol and drug abuse as a stipulation of probation. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against that person. Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such person. The court shall forward a record of any

> discharge and dismissal hereunder to the department of public safety who shall make and maintain the nonpublic record thereof as hereinbefore provided. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.